

STATE OF MICHIGAN
COURT OF APPEALS

FAIRVIEW BUILDERS, INC.,

Plaintiff/Counter-Defendant-
Appellant,

v

GARY M. BIRETA and LORENA BIRETA,

Defendants/Counter-Plaintiffs-
Appellees,

and

FIRST FEDERAL OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED

May 15, 2007

No. 266197

Lapeer Circuit Court

LC No. 99-027191-CH

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from an opinion of the circuit court calculating damages after remand from this Court. We affirm the trial court's assessment of damages. However, we remand for entry of judgment in the corrected amount of \$134,116.06.

This matter arises from a contract entered into between the parties for construction of defendants' residence. Plaintiff alleged that defendants failed to pay for services rendered. However, defendants countered that plaintiff failed to perform as required under the contract. Following a nine-day bench trial, the trial court concluded that plaintiff failed to perform as required and granted a judgment in favor of defendant homeowners in the amount of \$136,968.94. On plaintiff's motion for clarification, the trial court verbally indicated that it had reached the award amount by adding the amount still owed plaintiff on the contract (approximately \$80,000.00) and adding it to the amount testified to by plaintiff's expert that it would have cost to rectify the damages/inadequacies (approximately \$54,000.00).

This case made its first appearance before this Court in *Fairview Builders, Inc v Bireta*, unpublished opinion per curiam of the Court of Appeals, issued March 31, 2005 (Docket No. 251470) ("*Fairview I*"), wherein plaintiff's challenged the amount of damages awarded to defendants. In *Fairview I*, a panel of this Court found that the damage award to cure the defects

in defendant's residence must be set off against the remainder of the contract price. This Court also stated, however:

In addition to the eleven deficiencies in construction, the trial court cited to eighteen workmanship issues. The trial court did not make express calculable findings with regard to the cost of finishing the home to the specifications and the cost of curing the defective conditions presented in the home as caused by plaintiff. Moreover, the trial court did not conclude that the opinion of plaintiff's expert or an expert for the defense encompassed all of the items found to be deficient by the trial court. Furthermore, we note that the trial court could reach a damage award by examining the difference between the value of the building as tendered and the reasonable value of what was to be built. *Kokkonen v Wausau Homes, Inc.*, 94 Mich App 603, 615; 289 NW2d 382 (1980). Accordingly, we remand this litigation to the trial court for a determination of the computation of damages that comports with the trial court's factual findings." [slip op at p 5.]

On remand, the trial court calculated the damages owed to defendants on their counterclaim to be \$137,085.00. The trial court reached this number by adding together the amount defendant's expert calculated it would cost to complete and repair the breach of contract items (\$187,085.00) and the damages resulting from a shortage of square feet in the home (\$29,000.00), then subtracting the unpaid portion of the contract (\$79,000.00).

On appeal, plaintiff first argues that the trial court exceeded its authority by using the calculations of defendants' expert after remand rather than plaintiff's expert (cited by the trial court in its first ruling) when the trial court was limited, by this Court's prior opinion, to its original factual findings. We disagree.

We review a trial court's damage award following a bench trial for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). "Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made." *Id.* No error exists as long as "the trial court was aware of the issues and correctly applied the law[] and . . . the award was within the range of the evidence." *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995).

In the earlier appeal, this Court remanded the case because "[t]he trial court did not make express calculable findings with regard to the cost of finishing the home to the specifications and the cost of curing the defective conditions presented in the home as caused by the plaintiff." *Fairview Builders, Inc, supra*, slip op at p 5. As for the trial court's asserted reliance on plaintiff's expert, this Court noted that "the trial court did not conclude that the opinion of plaintiff's expert or an expert for the defense encompassed all of the items found to be deficient by the trial court." *Id.* These express conclusions belie plaintiff's claim that the trial court was limited on remand to the damages calculations of plaintiff's expert. Additionally, the trial court noted that "as far as the raw numbers" underlying its original damage award, it was "us[ing] the Plaintiff's numbers" because it was "giving every benefit of the doubt to the Plaintiff." The court never stated that it was adopting plaintiff's estimate of the cost to correct or rejecting

defendants' much higher estimate. On remand, the trial court, as finder of fact, was free to believe one expert and discount the testimony of another when calculating the damage award. *Triple E Produce Corp, supra* at 174. In other words, the trial court was free to adopt the findings of defendants' expert if it found that expert credible.

Plaintiff also claims the calculations for the loss in value for having a house 255 square feet smaller than contracted for was without basis in any evidence presented. Again, we disagree. Defendants did provide evidence on the value of the loss in the form of the difference between two different home appraisals, one based on the original plan and one based on the actual finished house (assuming all of the problems were fixed except for the square footage issue, which could not be fixed without tearing the house down).¹ Plaintiff may disagree with the appraisals, but that does not change the fact that they were entered into evidence.

We also reject plaintiff's argument that the court erred in calculating the damage resulting from the reduced square footage by multiplying the dollar per square foot cost to construct the home by the lost 255 square feet. Given the myriad of factors in play when calculating the value of a home, a cost per square foot averaged over the entire house, based on the original contract price, is a fairly common sense and reasonable way to calculate the value of the missing square footage. In fact, Michael Furnari, president of defendant Fairview Builders, testified that when potential customers ask how much it will cost to build a home, the customers are given an estimate range based on cost per square foot. Thus, calculating building cost by the square foot seems to be a common and accepted multiplier. It is true that a common multiplier does, by definition, mask the differences in costs between parts of the house. However, the individual rooms in a house are not built in isolation from the rest of the house.

As for the dollar amount itself, the court did err when it noted that Furnari testified that the cost of the house was \$114 per square foot. Actually, Furnari testified that a 3,000 square foot home priced at \$350,000 costs \$116 per square foot. However, this error is of no consequence given the record evidence. Furnari testified that the contract price of the home was \$352,958 and its purchase price was \$349,058. Defendant Gary Bireta also testified that the contract price was \$352,958. Gary Bireta further testified that his understanding was that the home would be 3,070 square feet. Given these figures, the square footage cost under the contract price is \$114.97, and \$114.82 under the purchase price. Accordingly, the \$114 figure is supported by the evidence. By adopting the findings of defendants' expert and then dealing reasonably with the 255 square foot deficit, the trial court came up with an award that was "within the range of the evidence" presented. *Triple E Produce Corp, supra* at 177.

On remand, the trial court offset its damages findings with the remainder of the contract price as directed. However, the trial court found that plaintiff claimed that the contract amount

¹ Moreover, this Court's observation that "the reduction of square feet of the size of the home can be easily determined" implicitly recognizes that this lost footage does have value. *Fairview Builders, Inc, supra*, slip op at p 5 n 3. Indeed, it seems axiomatic that such a loss has value. Regardless of where the square footage lies, it has value to the homeowner and to prospective buyers.

remaining was \$81,968.94, but only subtracted \$79,000 from the damages awarded defendant. The trial court offered no explanation why it used \$79,000 instead of the calculated contract amount. This Court expressly ordered that the damage award “must be set off against the remainder of the contract price.” *Fairview Builders, Inc, supra*, slip op at p 4. Therefore, the trial court should have subtracted the contract price of \$81,968.94, not \$79,000. This would reduce the ultimate award for defendants to \$134,116.06.

Plaintiff’s request for the restoration of its construction lien is moot, because plaintiff owes defendant damages in excess of the remaining contract price unpaid by defendant homeowners. Even if this were not the case, this is an inappropriate forum for that request. Finally, plaintiff’s request for case evaluation sanctions is without merit given the above analysis. See MCR 2.403(O)(1).

Affirmed in part, but remanded for entry of an award in the corrected amount of \$134,116.06 in favor of defendant. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto